**JURAIMI HUSIN**

**v.**

**PARDONS BOARD OF STATE OF PAHANG & ORS**

FEDERAL COURT, KUALA LUMPUR
WAN ADNAN ISMAIL PCA
AHMAD FAIRUZ CJ (MALAYA)
SITI NORMA YAAKOB FCJ
HAIDAR MOHD NOOR FCJ
DENIS ONG JCA
[CIVIL APPEAL NO: 1/2001(W)]
4 FEBRUARY 2002

***CONSTITUTIONAL LAW:*** *Clemency - Exercise of power of pardon by Ruler - Whether justiciable - Prerogative of mercy - Whether susceptible to judicial review - Whether amenable to judicial process - Federal Constitution, arts. 5(1), 42(4)(b), (8), 160, s. 38 (11th Schedule) - Laws of the Constitution of Pahang, art. 15*

***ADMINISTRATIVE LAW:*** *Judicial review - Applicability and scope of - Exercise of power of pardon by Ruler - Whether justiciable - Prerogative of mercy - Whether susceptible to judicial review - Whether amenable to judicial process - Federal Constitution, arts. 5(1), 42(4)(b), (8), 160, s. 38 (11th Schedule) - Laws of the Constitution of Pahang, art. 15*

***WORDS & PHRASES:*** *"law" - Federal Constitution, arts. 5(1) - Whether "law" includes 'procedure'*

The plaintiff had earlier been convicted for murder and sentenced to death in the High Court. His appeals to the Court of Appeal and the Federal Court were dismissed, and his petition for clemency to the Pardons Board of the State of Pahang was rejected. The plaintiff then applied to the High Court for declarations that the rejection of his petition for clemency by the Pardons Board was unconstitutional, null and void – primarily on the ground that there was an inordinate delay of almost two years between the presentation of his petition and the final decision of the Pardons Board. The defendants, on the other hand, applied to strike out the plaintiff's summons principally on the ground that the decision of the Pardons Board was not justiciable. Upon the application of the plaintiff under s. 84 of the Courts of Judicature Act 1964, the proceedings before the High Court were stayed pending the instant reference to the Federal Court respecting the following constitutional question: whether the decision-making process of the Sultan of Pahang pursuant to art. 15 of the Laws of the Constitution of Pahang read together with art. 42(4)(b) and (8) of the Federal Constitution ('FC') was justiciable *vis-à-vis*

the issue of whether there has been a violation of arts. 5(1) and s. 38 (11th Schedule) of the FC by reason of the delay on the part of the Pardons Board in coming to a decision. Counsel for the plaintiff contended that the word "law" in art. 5(1) of the FC includes 'procedure' and that art. 160 and s. 38 (11th Schedule) of the FC require that the Pardons Board meets with "all convenient speed". Whilst conceding that the decision of the Pardons Board was not justiciable on its merits, counsel submitted that the decision-making process leading to the decision was, nonetheless, amenable to judicial review.

**Held:**

**Per Ahmad Fairuz CJ (Malaya)**

**[1]** Prerogative powers, such as the prerogative of mercy, are not susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The power of pardon under art. 42 of the FC is a prerogative of mercy; its exercise is, therefore, not susceptible or amenable to judicial review. (See *dicta* of Lord Roskill in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1984] 3 All ER 935 which was followed by the Supreme Court in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449]. The process of clemency is clearly not justiciable. Treating the decision-making process of the Pardons Board as justiciable would ultimately render the decision itself justiciable. (pp 534 c & 537 a-b, g-h)

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif telah terdahulunya disabitkan bagi pembunuhan dan dijatuhkan hukuman mati di Mahkamah Tinggi. Rayuan-rayuan beliau kepada Mahkamah Rayuan dan Mahkamah Persekutuan telah ditolak, dan petisyen beliau untuk pengampunan kepada Lembaga Pengampunan Negeri Pahang telah ditolak. Plaintif kemudiannya memohon kepada Mahkamah Tinggi untuk pengisytiharan bahawa penolakan petisyen beliau untuk pengampunan oleh Lembaga Pengampunan adalah tidak berperlembagaan, batal dan tak sah – atas alasan bahawa terdapatnya kelewatan yang melampau selama hampir dua tahun antara pengemukaan petisyen beliau dan keputusan muktamad Lembaga Pengampunan. Defendan-defendan, sebaliknya, telah memohon untuk membatalkan saman plaintif atas alasan bahawa keputusan Lembaga Pengarah adalah tidak boleh diadili. Di atas permohonan plaintif di bawah s. 84 Akta Mahkamah Kehakiman 1964, prosiding di hadapan Mahkamah Tinggi telah digantung sementara menantikan rujukan semasa kepada Mahkamah Persekutuan berkenaan persoalan perlembagaan yang berikut: sama ada proses membuat keputusan oleh Sultan Pahang selaras dengan per. 15 Undang-Undang Perlembagaan Pahang yang dibaca bersama dengan per. 42(4)(b) dan (8)

Perlembagaan Persekutuan ('PP') adalah boleh diadili berhubungan dengan isu sama ada terdapatnya perlanggaran per. 5(1) dan s. 38 (Jadual ke-11) PP disebabkan oleh kelewatan di pihak Lembaga Pengampunan dalam mencapai satu keputusan. Peguam bagi pihak plaintif menegaskan bahawa perkataan "undang-undang" di dalam per. 5(1) PP termasuk 'prosedur' dan bahawa per. 160 dan s. 38 (Jadual ke-11) PP menghendaki supaya Lembaga Pengampunan membuat keputusan dengan "all convenient speed". Sementara menyetujui bahawa keputusan Lembaga Pengampunan tidak diadili atas merit-meritnya, peguam berhujah bahawa proses membuat keputusan yang membawa kepada tercapainya keputusan itu adalah, namun begitu, boleh dipinda mengikut kajian semula kehakiman.

**Diputuskan:**
**Oleh Ahmad Fairuz HB (Malaya)**

**[1]** Kuasa-kuasa prerogatif, seperti prerogatif pengampunan, adalah tidak mudah mendapat kajian kehakiman kerana sifatnya serta hal perkaranya adalah sedemikian rupa hinggakan tidak seharusnya dipinda kepada proses kehakiman. Kuasa pengampunan di bawah per. 42 PP adalah suatu prerogatif pengampunan; perlaksanaannya adalah, dengan itu, tidak mudah dipengaruhi atau boleh dipinda kepada kajian semula kehakiman. (Lihat *dicta* Lord Roskill di *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1984] 3 All ER 935 yang mana telah diikuti oleh Mahkamah Agong di dalam *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449). Proses pengampunan adalah jelas tidak boleh diadili. Menganggapkan proses membuat keputusan Lembaga Pengampunan sebagai boleh diadili akan akihirnya menjadikan keputusan itu sendiri boleh diadili.

**Case(s) referred to:**
*Council of Civil Service Unions & Ors v. Minister for the Civil Service [1984] 3 All ER 935* ***(foll)***
*Karpal Singh v. Sultan of Selangor [1987] 2 CLJ 342; [1987] CLJ (Rep) 686* ***(foll)***
*Kehar Singh v. Union of India AIR [1989] SC 653* ***(not foll)***
*PP v. Soon Seng Sia Heng [1979] 2 MLJ 170* ***(foll)***
*Re Tan Boon Liat & Anor [1977] 2 MLJ 108* ***(refd)***
*Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293* ***(foll)***
*Superintendent of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 CLJ 548; [1986] CLJ (Rep) 256* ***(foll)***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 84(1)
Federal Constitution, arts. 5(1), ss. 38 (11th Sch), 42(4)(b), (8), 160
Laws of the Constitution of Pahang, art. 15
Rules of the High Court 1980, O. 18 r. 19

Constitution of India [Ind], art. 72

*For the plaintiff - Karpal Singh (Jagdeep Singh Deo, Gobind Singh Deo & Ram Karpal Singh); M/s Karpal Singh & Co*
*For the respondents - Azhar Mohamad (Mohd Yusof Zainal Abiden, Mary Lim, Tun Abd Majid Tun Hamzah & Halim Aman)*

*[Appeal from High Court, Kuala Lumpur; Originating Summons No: R2-24-26-01]*

*[**Editor's note:** For a recent judicial interpretation of the phrase "with all convenient speed" please see also the decision of the Court of Appeal in Harbhajan Singh v. Suruhanjaya Pasukan Polis Malaysia & Anor [2002] 4 CLJ 85.]*

*Reported by Gan Peng Chiang*

## JUDGMENT

**Ahmad Fairuz CJ (Malaya):**

Juraimi bin Husin (the plaintiff) had, together with two others, been convicted of murder and sentenced to death by the High Court at Temerloh. His appeals to the Court of Appeal and the Federal Court had been dismissed. On 30 June 1999 he petitioned for clemency to His Highness the Sultan of Pahang. His petition was rejected on 4 April 2001. On his application, the execution of the death sentence was stayed pending his recourse to the court over the constitutionality of the rejection of his clemency petition.

By way of an originating summons filed in the High Court at Kuala Lumpur he applied for several declaratory orders pertaining to the rejection of the clemency petition. The Pahang Pardons Board, the Public Prosecutor of Malaysia and the Government of Malaysia, the defendants in the originating summons, applied under O. 18 r. 19 of the Rules of the High Court 1980 for the originating summons to be dismissed on the sole ground that the decision of the Pardons Board is not justiciable. During the hearing of the defendants' application, the plaintiff's counsel urged the court to remit the matter to the Federal Court under s. 84 of the Courts of Judicature Act 1964 for that court to decide on the constitutional issues raised. The High Court, however, dismissed the plaintiff's application. The plaintiff appealed to the Court of Appeal which unanimously allowed his appeal, set aside the High Court order, ordered the hearing of the originating summons in the High Court to be stayed and directed the High Court to remit to the Federal Court under s. 84(1) of the Courts of Judicature Act 1964 certain questions pertaining to the effect

of art. 5(1) and art. 42(8) read with s. 38 of the 11th Schedule to the Federal Constitution. In compliance with the orders of the Court of Appeal, the High Court remitted to us the following questions:

(i) Whether the decision making process of that decision by His Royal Highness the Sultan of Pahang under art. 15 of the Laws of the Constitution of Pahang read together with art. 42 of the Federal Constitution is justiciable, in particular as to whether or not there has been a violation of s. 38 of the 11th Schedule to the Federal Constitution and art. 5(1) of the Federal Constitution by reason of the time taken between the presentation of the clemency petition and that decision by His Royal Highness the Sultan of Pahang; and

(ii) If so, whether an inordinate delay between the presentation of that clemency petition and the decision by His Royal Highness the Sultan of Pahang necessarily amounts to a contravention of s. 38 of the 11th Schedule to the Federal Constitution and art. 5(1) of the Federal Constitution.

During the arguments before us, the plaintiff's counsel confirmed that he was not proceeding with the second question. As such we heard the submissions of both parties on the first question. After considering their submissions we unanimously answered the first question in the negative and intimated that we would state our reasons for doing so in writing. We do so now.

At the outset of his submission the learned counsel for the plaintiff contended that the word "law" in art. 5(1) of the Federal Constitution includes procedure. For this, he relied on the Federal Court's decision in the case of *Re Tan Boon Liat @ Allen & Anor*. [1977] 2 MLJ 108. The learned counsel conceded that there can be no judicial review or justiciability of the decision of the Pardons Board on the merits. He, however, contended that the decision-making process resorted to by the Board can be examined to consider whether it is in line with the spirit of the relevant constitutional provisions. For this contention, he relied on the case of *Kehar Singh v. Union of India* AIR [1989] SC 653 at 654-660. The learned counsel then urged us to consider whether arts. 42(4)(b) and 42(8) of the Federal Constitution have been complied with by the Pardons Board. He pointed out that art. 42(8) does not provide any time period as to when the Pardons Board must meet to consider and dispose of the clemency petition. However, according to counsel, art. 160 and s. 38 in the 11th Schedule to the Federal Constitution necessitate the Board to meet with speed. Counsel argued that the inordinate delay between the presentation of the clemency petition dated 30 June 1999 and the decision-making process leading to the rejection of the said petition on 4 April 2001 amounted to the contravention of s. 38 in the 11th Schedule, arts. 5(1), 42(4)(b) and 42(8) of the Federal Constitution.

In his reply, counsel for the defendants argued that the power to grant pardon is bestowed upon the Sultan of Pahang by virtue of art. 15 of the Laws of the Constitution of Pahang. This power is, according to him, a prerogative of mercy which is not amenable to judicial review. He referred us to the House of Lords' decision in the case of *Council of Civil Service Unions & Others v. Minister for the Civil Service* [1984] 3 All ER 935 (hereinafter referred to as the *Civil Service Unions* case) wherein at p. 956 Lord Roskill said:

> Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.

This *Civil Service Unions* case, urged counsel, had been referred to by our Supreme Court in the case of *Sim Kie Chon v. Superintendent of Pudu Prison & Ors.* [1985] 2 CLJ 449; ([1985] CLJ (Rep) 293) wherein Abdul Hamid CJ (Malaya) at p. 452 (p. 295) said:

> In the present case though the Pardons Board tendered advice to the Yang di-Pertuan Agong but clearly Yang di-Pertuan Agong himself exercised the power in accordance with art. 42(1) above read together with regulation 29 of the Essential (Security Cases) (Amendment) Regulations 1975. *In our view such power is a power of high prerogative of mercy which is an executive act but by its very nature is not an act susceptible or amenable to judicial review.* (See *Council of Civil Service Unions and Others v. Minister for the Civil Service*). (emphasis added)

The learned counsel then drew our attention to the case of *Karpal Singh v. Sultan of Selangor* [1987] 2 CLJ 342; [1987] CLJ (Rep) 686 wherein Abdul Hamid CJ (Malaya), said:

> Basically, the originating summons relates, at least indirectly, if not directly, to an issue concerning the process of clemency which is clearly non-justiciable.

Counsel further adverted us to the case of *Public Prosecutor v. Soon Seng Sia Heng* [1979] 2 MLJ 170 wherein Suffian LP, said (at p. 171):

> When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which courts bound by the law of evidence cannot take into account, and decides each case on grounds of public policy; such decisions are a matter solely for the executive. We cannot confirm or vary them; we have no jurisdiction to do so.

Finally, the defendants' counsel contended that the Supreme Court in *Superintendent of Pudu Prison & Ors. v. Sim Kie Chon* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 had held that it was a fallacy to refer a decision of

the Pardons Board to the court for consideration when in so doing it was indirectly impugning the decision and order of the King which was obviously non-justiciable. On the strength of the authorities cited above the learned counsel submitted that the grant of mercy or pardon is purely an act of grace on the plaintiff's plea for a favour or benevolence and the prerogative remains personal and exercised by His Royal Highness alone and that the exercise of the prerogative is not justiciable.

One of the questions considered by the Indian Supreme Court in *Kehar Singh v. Union of India (supra)* was whether judicial review extends to an examination of the order passed by the President of India under art. 72 of the Indian Constitution. The relevant art. 72(1) of the Indian Constitution reads:

> The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence:
>
> (a) in all cases where the punishment or sentence is by a court martial;
>
> (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;
>
> (c) in all cases where the sentence is a sentence of death.

The Supreme Court (at p. 659 of the report) said:

> ... we think that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram v. Union of India* [1981] 1 SCR 1196 at p. 1249: (AIR [1980] SC 2147 at pp. 2174-2175). The function of determining *whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the Court.* In Special Reference No. 1 of 1964: [1965] 1 SCR 413 at p. 446: (AIR [1965] SC 745 at p. 763) Gajendragadkar CJ, speaking for the majority of this Court, observed:
>
> > ... whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution ...
>
> This Court in fact proceeded in *State of Rajasthan v. Union of India* [1978] 1 SCR 1 at pp. 80-81: (AIR [1977] SC 1361 at pp. 1413-1414) to hold:
>
> > ... So long as a question arises **whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court.** Indeed, it would be its Constitutional obligation to do so ... This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of

> determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the Constitutional values and to enforce the Constitutional limitations. That is the essence of the Rule of Law ... . (emphasis added)

Equivalent to the Indian art. 72 is art. 42 of our Federal Constitution which reads:

> 42.(1) The Yang di-Pertuan Agong has power to grant pardons, reprieves and respites in respect of all offences which have been tried by court-martial and all offences committed in the Federal Territories of Kuala Lumpur and Labuan; and the Ruler or Yang di-Pertua Negeri of a State has power to grant pardons, reprieves and respites in respect of all other offences committed in his State.

As to the power under art. 42, the learned counsel for the defendants had earlier referred us to what our Supreme Court in the case of *Sim Kie Chon v. Superintendent of Pudu Prison* [1985] 2 CLJ 449; ([1985] CLJ (Rep) 293) had said at p. 452 (p. 295) of the report. In fact, at the same page, the Supreme Court continued thus:

> ... Basically it is an executive power of the nature described by Suffian LP, delivering the judgment of the Court in *Public Prosecutor v. Lim Hiang Seoh* [1979] 2 MLJ 170. Sitting with 4 other judges, his Lordship said:
>
> > *When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which courts bound bv the law of evidence cannot take into account and decides each case on grounds of public policy; such decisions are a matter solely for the executive. We cannot confirm or vary them;* we have no jurisdiction to do so. The royal prerogative of mercy, as is recognized by its inclusion in Chapter 3 of Part IV of the Constitution, is an executive power as in *Jamaica, Hinds v. The Queen.* (emphasis added)

Further on, at p. 453 (p. 296), the Supreme Court said:

> In the present case the appellant's right ends after his appeal was dismissed by the Supreme Court and death sentence confirmed. Mercy begins but *mercy is not a legal right.* In the case of *Chiow Thiam Guan v. Superintendent of Pudu Prison and the Government of Malaysia* [1983] 2 MLJ 116, it was held that a decision made pursuant to an exercise of a royal prerogative of mercy cannot be varied or confirmed there being no jurisdiction to do so. In our judgment *proceedings in Court aimed at questioning the propriety or otherwise of such a decision are therefore not justiciable.* By the same token a contention of any violation of the fundamental right which rests wholly on or dependent upon such an allegation is also not justiciable. It is our considered view that the power of mercy is a high prerogative exercisable by the Yang di-Pertuan Agong or the Ruler of a State or the Yang di-Pertuan Negeri, as the case may be, who acts with the greatest conscience and care and without fear or influence from any quarter. (See *Hanratty and Another v. Lord Butler of Saffron Walden* [1971] 115 Solicitors Journal p. 386). (emphasis added)

In stating that the power under art. 42 of the Federal Constitution is not susceptible or amenable to judicial review, our Supreme Court was then relying on the Civil Service Unions case *(supra)*. Our Supreme Court and the House of Lords in the *Civil Service Unions* case had referred to this power under art. 42 as the prerogative of mercy. And as pointed out to us by the learned defendants' counsel in the excerpt of Lord Roskill (quoted above) the prerogative of mercy is amongst the powers that Lord Roskill thought not to be susceptible to judicial review because its nature and subject-matter is such as not to be amenable to the judicial process.

About three years after the decision of our Supreme Court in the case of *Sim Kie Chon v. Superintendent of Pudu Prison (supra)* the High Court Kuala Lumpur was faced with an application by originating summons for a declaration that the public statement made by the Sultan of Selangor (which was reported in the English newspapers) that he would not pardon anyone sentenced to death for drug trafficking in Selangor is in violation of art. 42 of the Federal Constitution. This is the case of *Karpal Singh v. Sultan of Selangor (supra)*. In his application to strike out the originating summons, the Sultan contended, *inter alia*, that the originating summons did not disclose any reasonable cause of action as the issue raised therein is not justiciable. The High Court, after referring to several authorities which include the case of *Sim Kie Chon v. Superintendent of Pudu Prison (supra)* and the Civil Service Unions case held that:

> Basically **the originating summons relates, at least indirectly,** if not directly, **to an issue** concerning the process of clemency which is clearly non-justiciable. (emphasis added)

The High Court then proceeded to hold the issue raised in the originating summons is not justiciable.

In the light of the above-mentioned authorities, we find it difficult to agree with the Indian authorities referred to in this judgment and by the plaintiff. To us, the effect of making the decision-making process justiciable would, in the final analysis, make the decision itself to be held null and void. This would have the same effect as having the decision itself justiciable. Consequently, we are of the view that any attempt to make the decision-making process justiciable would indirectly make the decision itself justiciable. Hence we answered the first question in the negative.